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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-FV-15-0046; FV15-930-1 IR]

Tart Cherries Grown in the States of Michigan, et.al.;

Revision of Exemption Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to revise the exemption provisions under the marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin (order). The Board locally administers the order and is comprised of growers and handlers operating within the production area. This rule changes the number of years that new market development and market expansion projects are eligible for handler diversion credit from one year to three years. This rule also revises the composition of the subcommittee which reviews exemption requests. These changes are intended to encourage handlers to participate in new market and market expansion activities to facilitate sales and help ensure impartiality during the review process.

DATES: Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]; comments received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional

Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324-3775, Fax: (863) 291-8614, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jeffrey.Smutny@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule revises the exemption provisions prescribed under the order. This rule expands the availability of diversion credits for new market development and market expansion activities from one year to three years. This rule also revises the composition of the subcommittee which

reviews exemption requests. These changes are intended to encourage the use of new market developments and market expansion activities to facilitate sales and to help ensure impartiality during the review process. These changes were unanimously recommended by the Board at its meeting on June 25, 2015.

Section 930.59 of the order authorizes handler diversion. When volume regulation is in effect, handlers may fulfill any restricted percentage requirement in full or in part by acquiring diversion certificates or by voluntarily diverting cherries or cherry products in a program approved by the Board, rather than placing cherries in an inventory reserve.

Section 930.159 of the order's administrative rules specifies methods of handler diversion, including using cherries or cherry products for exempt purposes prescribed under § 930.162. Section 930.162 establishes the terms and conditions of exemption that must be satisfied for handlers to receive diversion certificates for exempt uses. Section 930.162(b) defines the activities which qualify for exemptions under new market development and market expansion and the period for which they are eligible for diversion credit. New market development and market

expansion activities include, but are not limited to, sales of cherries into markets that are not yet commercially established, product line extensions, or segmentation of markets along geographic or other definable characteristics.

Section 930.162(d) establishes a Board-appointed subcommittee to review the applications for exemption or renewal of exemption and to either approve or deny the exemption. This section currently specifies that the subcommittee consist of three members, including the Board manager, or a Board member acting in the manager's stead, the public member, and one industry person who is not on the Board.

The order provides for the use of volume regulation to stabilize prices and improve grower returns during periods of oversupply. At the beginning of each season, the Board examines production and sales data to determine whether a volume regulation is necessary and if so, announces free and restricted percentages to limit the volume of tart cherries on the market. Free percentage cherries can be used to supply any available market, including domestic markets for pie filling, water packed, and frozen tart cherries. Restricted percentage cherries can be placed in

reserve, or be used to earn diversion credits as prescribed in §§ 930.159 and 930.162 of the order's administrative rules. These activities include, in part, the development of new products, new market development and market expansion, the development of export markets, and charitable contributions.

In 2012, the Board made a series of changes to the volume control provisions to facilitate the marketing of tart cherries and to help lower restrictions during seasons when volume control is implemented. One of these changes was to decrease the number of years that new market development and market expansion projects are eligible for handler diversion credit from three years to one year. The Board thought this decrease would continue to encourage new market development and market expansion projects, while reducing the impact these credits had on volume restriction calculations. At that time, these sales were not included in the average sales figure used to determine optimum supply for volume regulation. The Board anticipated the change would shift more volume to sales helping to reduce the calculated surplus and lower the restricted percentage.

In revisiting this change, the Board recognized that the underlying rationale for having reduced the duration of

diversion credit for new market development and market expansion was no longer an issue. Since that change, the method for calculating average sales for the purpose of volume regulation has been adjusted so that only export sales are excluded from the average sales calculation. Consequently, all sales from market development and market expansion activities are now included as sales when calculating a restriction. Therefore, increasing the number of years new market development and market expansion projects are eligible to receive diversion credit from one year to three years will not significantly impact the calculations for free and restricted percentages.

Further, since making this change, participation in new market development and market expansion activities has dropped dramatically. In years prior to changing from three years to one year, applications for new market activities numbered around 20 to 25 a season. For the 2014-15 season, the first season with volume regulation since the change, applications dropped to eight. Handlers stated that it was not worth the time and effort to develop one of these projects if the benefit was only for a single year. It was reported that the shortened time frame did

not allow handlers to recoup the resources needed to establish one of these projects.

The Board affirmed its support for new market development and market expansion diversion credit programs. Accordingly, the Board voted unanimously to change the exemption provisions applicable to handler diversion activities by increasing the number of years that new market development and market expansion activities are eligible for diversion credit back to three years. The Board also noted that projects approved for the 2014-15 season would be allowed to continue and be subject to the new three-year cycle.

This action also revises the composition of the subcommittee appointed to review exemption applications. The subcommittee was formed to assist Board staff members in reviewing and granting exemptions. The subcommittee reviews applications to use restricted cherries for activities related to new product development, new market development and market expansion, the development of export markets, and for experimental purposes. Current rule provisions (§930.162(d)) state that the subcommittee consists of the manager of the Board or a Board member acting in their stead, the public member, and one industry

member who is not on the Board. The Board recommended changing the composition of the subcommittee to help ensure impartiality so that no one affiliated with a handler was part of the review process.

Consequently, the Board recommended revising the subcommittee to consist of three members all of whom are not affiliated with a handler, but have industry knowledge. One of these members shall be the public member or the alternate public member, if available to serve. The subcommittee will also include a similarly qualified alternate should one of the other members be unable to serve.

The Board made several other recommendations for changes to the regulations under the order at its June 25, 2015 meeting. However, these changes will be considered under a separate action.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$750,000 and small agricultural service firms have been defined as those having annual receipts of less than \$7,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service and Board data, the average annual grower price for tart cherries during the 2013-14 season was \$0.35 per pound, and total shipments were around 289 million pounds. Therefore, average receipts for tart cherry producers were around \$168,600, well below the SBA threshold for small producers. In 2014, The Food Institute estimated an f.o.b. price of \$0.96 per pound for frozen tart cherries, which

make up the majority of processed tart cherries. Using this data, average annual handler receipts were about \$6.9 million, which is also below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This rule revises § 930.162 of the regulations regarding exemptions by changing the number of years that new market development and market expansion projects are eligible for handler diversion credit from one year to three years. This rule also revises the composition of the subcommittee which reviews exemption requests. These changes are intended to encourage the use of new market development and market expansion activities to facilitate sales and to help ensure impartiality during the review process. The authority for these actions is provided in § 930.59 of the order. These changes were unanimously recommended by the Board at its meeting on June 25, 2015.

It is not anticipated that this action will impose additional costs on handlers or growers, regardless of size. Rather, this should help handlers receive better returns on their new market development and market expansion projects by providing additional time for the

handlers to receive diversion credit for those activities. This should provide more opportunity for them to recoup the time and resources required to establish these projects. In addition, changing the number of years that these projects are eligible for diversion credits may provide additional incentive for handlers to develop these programs, and may facilitate additional sales which could improve returns for growers and handlers. Further, the Board does not believe that this change significantly impacts the calculations for free and restricted percentages.

The change in composition of the subcommittee is administrative in nature, and not expected to result in any additional costs.

This rule is expected to benefit the industry. The effects of this rule are not expected to be disproportionately greater or less for small handlers or producers than for larger entities.

The Board discussed alternatives to these changes, including not changing the number of years that new market development and market expansion projects were eligible for diversion credit. The Board agreed that increasing the number of years that new market development and market

expansion projects were eligible for diversion credit from one year to three years provides handlers with more incentive to utilize these programs, while not impacting the calculations for free and restricted percentages. Another alternative considered was maintaining the current composition of the subcommittee responsible for reviewing exemption requests. However, the Board wanted to specify that the subcommittee be composed of members who are not affiliated with any handler. Therefore, for the reasons mentioned above, these alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0177, (Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin). No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

Accordingly, this rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed

to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

The Board's meeting was widely publicized throughout the tart cherry industry and all interested persons were invited to attend and participate in Board deliberations on all issues. Like all Board meetings, the June 25, 2015, meeting was a public meeting and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
<http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide>.
Any questions about the compliance guide should be sent to

Jeffrey Smutney at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on changes to the exemption requirements currently prescribed under the order. Any comments received will be considered prior to the finalization of this rule.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The Board would like this in place as soon as possible should volume regulation be recommended for this season so handlers can consider these changes when making plans; (2) the Board unanimously recommended these changes at a public meeting and interested parties had an opportunity to provide input; and

(3) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930 - TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 930.162 is amended by revising the last sentence of paragraph (b) (2) and revising paragraph (d) to read as follows:

§ 930.162 Exemptions.

* * * * *

(b) * * *

(2) * * * In addition, shipments of tart cherries or tart cherry products in new market development and market expansion outlets are eligible for handler diversion credit

for a period of three years from the handler's first date of shipment into such outlets.

* * * * *

(d) Review of applications. A Board appointed subcommittee shall review applications for exemption or renewal of exemption and either approve or deny the exemption. The subcommittee shall consist of three members and one alternate, each having no handler affiliation but knowledge of the tart cherry industry, one of whom shall be the public member or the alternate public member if available to serve. Any denial of an application for exemption or renewal of an existing exemption shall be served on the applicant by certified mail and shall state the reasons for the denial. Within 10 days after the receipt of a denial, the applicant may file an appeal, in writing, with the Deputy Administrator, Specialty Crops Program, supported by any arguments and evidence the applicant may wish to offer as to why the application for exemption or renewal of exemption should have been approved. The Deputy Administrator, upon consideration of such appeal, will take such action as deemed appropriate with respect to the application for exemption or renewal of exemption.

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Dated: October 30, 2015

Rex A. Barnes
Associate Administrator
Agricultural Marketing Service

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